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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **22/11/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

EDWARD CORR

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE (NUMBER 4 of 2018)

Before Stephens LJ, Treacy LJ and Keegan J

Stephens LJ (delivering the judgment of the court)

Introduction

[1] This is a reference by the Director of Public Prosecutions for Northern Ireland under Section 36 of the Criminal Justice Act 1988 as amended by Section 41(5) of the Justice (Northern Ireland) Act 2002. At the hearing of the reference we granted leave to challenge, as unduly lenient, the concurrent sentences of 18 months imprisonment (9 months in custody: 9 months on licence) imposed on 4 July 2018 by a Crown Court judge ("the judge") on Edward Corr ("the respondent") for two offences, namely:

(a) possession of firearms and ammunition with intent by means thereof to endanger life or cause serious damage to property, or to enable some other person by means thereof to endanger life or cause serious damage to property contrary to Article 58(1) of the Firearms (NI) Order 2004 ("the 2004 Order"), and

(b) possession of a prohibited weapon namely a Skorpion sub machine gun, contrary to Article 45(1) of 2004 Order.

The Factual Background

[2] On 24 October 2016 police attended at the respondent's home which is off the Stewartstown Road, Belfast. They searched a garden shed at the rear of the property and found firearms and ammunition inside a number of bags and a drill box. The items and their condition on forensic examination were as follows:-

a) A Yugoslavian Skorpion M84 .32 calibre sub machine gun. There was some rust and corrosion on the weapon but it was in good overall condition and it successfully fired in single shot mode and in fully automatic mode;

b) A magazine compatible for use with the Skorpion machine gun. This magazine was described as "heavily corroded but functional";

c) The magazine contained 3 x .32 calibre cartridges with full metal jacketed bullets;

d) A Bruni 9mm blank calibre self-loading pistol with magazine. When examined it was discovered that the barrel was fully blocked as someone had attempted to fire a .32 calibre bullet from the weapon. It was concluded that when an attempt was made to convert this weapon from a blank firing pistol to a weapon which could fire conventional bullets, the individual modifying it had failed to drill out the barrel sufficiently. In its current state it was concluded that it was unlikely to be capable of firing conventional bullets but could have, and did when test-fired, fire blank cartridges including those containing ball bearings;

e) A German Weihrauch 9mm blank firing, self-loading pistol which was described as being in "good/fair condition" with some rust/corrosion present. The pistol would be capable of firing 9mm blank firing cartridges seated with ball bearings;

f) A magazine compatible with the Weihrauch pistol;

g) A Glock magazine with 15 round capacity; and

h) 18 rounds of 17mm ammunition with full metal jackets.

[3] The respondent's DNA and fingerprints were found on some of the socks and bags in which the items were found. His fingerprint was also found on the magazine recovered with the Bruni pistol.

The respondent's responses at interview

[4] The respondent was interviewed on the afternoon of 24 October 2016.

[5] In the first three interviews he made no comment.

[6] At the beginning of the fourth interview the respondent indicated that he wished to provide an account to the police. He told them that approximately six weeks earlier he had been outside his house just after midnight having a cigarette when he saw a man attempting to place a bag around the area of his fence. He stated that he challenged the man who said he was on official Óglaigh na hÉireann business. He said that he told the man to get out but the man pulled a gun on him and said "you're taking this and you're going to hide it and someone will approach you for it." The respondent then stated to police that he resisted but the man pointed the gun at his head telling him to take the bag. The respondent said that he then threw the bag straight into his bin but having reflected on what had occurred he determined that it would be safer to remove the bag from the bin, as children would play in the area. He then stated that he recovered the bag and threw it into his shed where it remained for three weeks until one day when he went to fetch something from the shed. He stated that at that point everything fell out of the bag and he had to put it all back in.

[7] Part of the respondent's description during the fourth interview was in the following terms:

> "… he pulled a gun on me. He says you're taking this and you're going to hide it and someone will approach you for it. And I says I'm not. I actually threw it down and he picked it back up and he says you'll take it. He pointed the gun at my head. He says you're taking this. And I didn't know what to do. That's the first time I've ever been in a situation like that and I took it and threw it in the wheelie bin straight away."

[8] Also during the fourth interview the respondent described his state of mind in the following terms:

> "The only thing is I'm afeared [sic]. I'm going to get shot for this. Is this something going to happen to me now because these people don't get what they're looking. Like I haven't slept hardly in six weeks … I don't know what's all I was told was I'm going to be approached now and I don't have the stuff what's going to happen to me? What's

> going to happen to my kids? This is why I have been ascared [sic] to say anything or approach anybody. I don't know what to do …."

[9] Another aspect of the police interviews was that the respondent denied that he had ever loaded any of the weapons or placed any magazine inside any of the pistols.

The basis of Plea

[10] On 17 May 2018 the basis of plea was agreed between the prosecution and defence following which the respondent was re-arraigned and pleaded guilty. The basis of plea was in the following terms

> "The defendant pleads to counts 1 and 3 with count 2 being left on the books not to be proceeded with without leave of this court or the Court of Appeal.
>
> On 24 October 2016, Police carried out a search at the defendant's home at 29 Foxes Glen, Stewartstown Road, Belfast. In the course of the search and in the rear of the property in a garden shed, police recovered three weapons and two magazines that were categorised as firearms pursuant to the Firearms (Northern Ireland) Order 2004 and some ammunition inside a number of bags and a drill box. These are the subject of various expert reports contained within the papers.
>
> The defendant was arrested and interviewed. He gave a detailed account, making the case that he had been forced to hold the items.
>
> The defendant resides at 29 Foxes Glen in West Belfast with his wife and three young children. He indicated that on a date around late September 2016, just after midnight, he was outside his property smoking when he discovered a man attempting to hide a bag on his property. He confronted the man who identified himself as a member of a Paramilitary organisation. The man told the defendant to hold the bag and that he would be contacted by someone who would collect it from him. The defendant indicated that

he refused to do this but that the man produced a handgun, pointed it at his head and threatened him. The defendant placed the items in a bin and then moved them to the shed at the rear of the property, where they remained for between 5-6 weeks. On one occasion the defendant indicated he was removing items from the shed when the bag fell out. He replaced a number of items in the bag and replaced it in the shed.

The defendant argued that he felt in fear for himself and his family. He stated that he was worried about what might happen to himself or his family if he did not comply and that this man or his associates might visit violence upon them. The defendant had raised a duress defence in the course of this case but *it is accepted* by his plea *and by the Prosecution that it cannot disprove as a possibility that he was placed under the pressure he described, [albeit] it does not amount in law to the defence of duress*.

The items recovered have not previously been used in any criminal offences. Nor is there any indication that any of the weapons were being readied for use.

The machine gun, whilst functional was described as being rusted and corroded. A magazine found along with this gun was also functional but heavily corroded.

The other two pistols were modified blank firing pistols. The barrel of one was fully blocked. Neither was capable of firing 9mm rounds although the opinion was that either could, if work was carried out, potentially fire a cartridge with a ball bearing in it.

With the exception of a driving matter the defendant has a clear record. He has worked most of his life as a joiner and had never before been arrested in connection with any matter. The defendant was released on bail by Mr Justice Burgess and complied fully with his conditions, including a return to work. There is nothing pending against him. *During his remand in custody he co-operated with*

> *the authorities and provided further fingerprints* (when the first set were of insufficient quality) despite the fact that he was not legally required to do so and was advised accordingly by his solicitor. *He remained in the general population at the prison while on remand and avoided the paramilitary landing. The defendant is a vulnerable adult*, has a medical history of *very poor mental health* and *personal tragedy* which the Defence will outline in the course of sentencing submissions." (emphasis added).

[11] We have added emphasis to various parts of the agreed basis of plea including the prosecution's acceptance (a) that *it cannot disprove as a possibility that he was placed under the pressure he described* and (b) that the respondent is a *vulnerable adult* with a medical history of *very poor mental health.*

[12] The principles to be followed in relation to an agreed basis of plea were set out by this court in *R v Caswell* [2011] NICA 71 at paragraph [8].

The plea hearing

[13] On 29 June 2018 at the plea hearing prosecuting counsel outlined the factual circumstances by reading the basis of plea document into the record. In addition he furnished a number of authorities to the judge including *R v Taylor and Neilly* [2008] NICC 9 (Deeny J), *R v Grant and Madden* [2005] NICC 35 (Weir J) and a decision of the Court of Appeal in *R v Keith McConnan* [2017] NICA 40 (Weatherup LJ). The prosecution did not contend that these decisions established any clear sentencing range for the present case. Rather, counsel informed the judge that he didn't "need to look in any detail" at these cases to which he then made brief reference. Having done so he then submitted "so there is no specific guidance in this type of case." He continued by stating that possession with intent was clearly "leaning" towards a substantial custodial sentence. In relation to the count of possession of a prohibited weapon he pointed out that there is a minimum sentence of 5 years except in exceptional circumstances. He did not contend that there were no exceptional circumstances in this case nor did he contend that the appropriate sentencing range (after trial) for offences of this type was in the region of 10-13 years.

[14] In mitigation defence counsel referred the Court to the psychiatric and psychological reports provided by Dr McGarry and Dr Devine. He outlined the respondent's personal circumstances and referred to the pre-sentence report prepared by Probation and also to a number of testimonials. In particular counsel drew attention to the following:

i. The absence of any aggravating features relating either to the respondent or to the offence;
ii. The respondent did not meet the criteria of presenting a significant risk of serious harm through the commission of further specified offences;
iii. The firearms and ammunition had no previous history and had not been readied for use;
iv. The respondent's plea of guilty. It was submitted that the fact that this was only entered on the morning of trial should be seen in the context that the respondent never denied possession of the firearms and ammunition so that the only issue was whether the circumstances were capable of amounting to duress. It was also submitted that the timing was to be seen in the context that there was quite a bit of disclosure that had been obtained and had to be worked through;
v. The respondent's bitter regret at not having confided in his wife and in the authorities;
vi. The respondent's cooperation with the authorities in providing fingerprints when he was not obliged to do so;
vii. The familial consequences of 18 months of very strict bail conditions including the respondent's inability to visit his mother who lived in Donegal;
viii. The respondent's plan to move away from Northern Ireland as soon as he was able so that there was a long term adverse impact on his private life;
ix. The respondent's clear criminal record;
x. The respondent's below average intelligence;
xi. The fact that the respondent, then aged 39 was married with three young children – two girls aged 13 and 11 and a little boy aged 9;
xii. The observed impact on his wife of the prospect of the respondent's imprisonment;
xiii. The fact that the middle child suffers from serious health problems and that the respondent's wife relied heavily upon the respondent in looking after the children;
xiv. The character references attesting to the respondent's industry and good character both as a worker and as a father;
xv. The evidence establishing that the respondent's early life was "replete with tragedy and trauma" including witnessing the horrific death of his four year old brother when he was seven years old;
xvi. The consequences of that and other traumas as established in the un-contradicted medical expert reports;
xvii. The consequential but unaddressed mental health concerns and the respondent's thoughts of life not worth living;

xviii. The uncontested diagnosis that the respondent suffered from chronic symptoms of post-traumatic stress disorder ("PTSD"), that he was very depressed and had been referred for counselling;

xix. The fact that both Dr McGarry and Dr Devine diagnosed the respondent as suffering from PTSD as a result of witnessing the death of his brother;

xx. The fact that Dr Devine also diagnosed depression stemming from the PTSD;

xxi. The pressure which he was placed under by a terrorist organization; and

xxii. That the respondent's reaction to that pressure had to be seen in the context of his psychological state.

[15] The vulnerability of the respondent and his medical history of very poor mental health was set out in two medical reports referred to at the plea hearing. At paragraph 4 of his report Dr Megarry, Consultant Psychiatrist, stated:

> "In my opinion his PTSD symptoms have led to Mr Corr being a very sensitive individual whose coping mechanisms are vulnerable to the effects of external stress factors. His typical defence mechanism over the years has been to avoid thinking too much about disturbing events and replacing reflection with activity. This mental style has actually enabled him to function at a reasonable level for a long time, but is inherently fragile and liable to break down under pressure. The situation in which he was placed was among the most frightening any person could experience, and given Mr Corr's long history of mental pain and vulnerability, his terror about informing the authorities and failure to do so was understandable from a psychological perspective."

Dr Devine, Senior Clinical Psychologist commented in his report:

> "As stated above, Mr Corr is organised by his PTSD, he perceives the world through a prism of fear. Having reviewed Dr McGarry's report I would agree that Mr Corr is a "sensitive individual" I believe that he is likely to presume the "worst case scenario" and will act in order to protect himself and his family. Dr McGarry states that "given Mr Corr's long history of mental pain

> and vulnerability, his terror about informing the authorities and failure to do so was understandable from a psychological perspective", I would again agree with this statement."

[16] Defence counsel invited the court to conclude that all these factors taken in combination amounted to exceptional circumstances which justified the court in exercising its power under Article 70 of the Firearms (NI) Order 2004 to impose a sentence less than the statutory minimum of 5 years imprisonment in respect of the Article 45(1) offence.

[17] Prosecuting counsel in reply did not contend (i) that there was an appropriate sentencing range for these offences or (ii) that the sentencing range was in the region of 10-13 years. Prosecuting counsel did not challenge the submission that there were exceptional circumstances which would justify the court in imposing a sentence less than the statutory minimum of 5 years. Furthermore the prosecution did not call any evidence to undermine or rebut the unchallenged evidence from the two medical experts whose reports had been made available on behalf of the respondent. Indeed the prosecution had agreed in the basis of plea document that the respondent was a *vulnerable adult* with *a medical history of poor mental health*.

The judge's sentencing remarks

[18] We summarize some of the features of the judge's sentencing remarks.

[19] In relation to the authorities referred to by the prosecution the judge considered that "the facts and circumstances of those cases are far removed from this one, not only as to the nature of the offending but also the roles and background of the offenders." He distinguished those cases regarding them as "far removed" from this case on all relevant dimensions.

[20] The judge acknowledged that the principle of deterrence ran through all of the authorities and that a custodial sentence was inevitable even in a case with exceptional circumstances.

[21] The judge noted the respondent's pleas of guilty which were entered on the morning of trial. He observed that the respondent had made full admissions at interview and was co-operative with the authorities as reflected in the basis of plea document. He noted that the respondent presented himself voluntarily to the police and came to the house after the search had commenced when he identified himself to the police officers. He noted defence counsel's submissions that there were very significant disclosure issues that arose during the lead up to the trial which required careful perusal and that prosecuting counsel, "very helpfully observed in ease of the defence that there [had been] a remarkable development" in relation to another

fingerprint which led to the arrest of a prosecution witness. He referred to the case of *R v Esmaily* [2010] NICC 20 where the offender had not entered his plea at the earliest stage but was nonetheless given full discount for his plea because he did not dispute the facts at police interview. He referred to the fact that the offender in *R v Esmaily* was open and honest in relation to the facts just as the respondent was in the present case. He accepted that any delay on the respondent's part in entering a plea of guilty "… was based upon genuine concern as to whether or not [on] the facts [he was] legally guilty and [stated] you justifiably required time to give anxious consideration to this matter with your legal advisers …" and in these circumstances he gave full credit to the respondent for his pleas of guilty.

[22] The judge referred to the case of *R v Avis & others* [1998] 1 Cr App R 420 which set out four questions which it would usually be appropriate for a sentencing court to ask. We set out those questions and the answers provided by the judge.

[23] The *first question* is "*what sort of weapon is involved*?" From *R v Avis* it can be seen that in assessing the significance of the answer to that question that:

> "genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use."

The judge answered that question by stating that:

> "…in this particular case the machine gun whilst functional was described as being rusted and corroded and the blank firing pistols while not capable of firing 9mm rounds but with work, if carried out, could potentially fire a cartridge with a ball bearing."

[24] The *second question* is "*what (if any) use has been made of the firearm*?" Again from *R v Avis* it can be seen that in assessing the significance of the answer to that question that:

> "… the more prolonged and premeditated and violent the use, the more serious the offence is likely to be."

The judge answered that question by stating that:

> "Again, there is no history here, the weapons have not previously been used in any criminal offence, nor is there any indication that any of them were ready for use and that contrasts [markedly] with the cases that have been referred to where weapons were ready to be used and ready to go effectively."

[25] The *third question* is "*with what intention (if any) did the respondent possess or use the firearm?*" The comment in *R v Avis & others* in relation to the answer to that question is that "generally speaking, the most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence." The judge answered that question by stating:

> "Well, as (defence counsel) pointed out in his plea, this is, of course, a second limb case."

The judge did not elaborate in his answer to this question as to the serious significance of such an intent.

[26] The *fourth question* is "*what is the defendant's record?*" The comment in *R v Avis & others* in relation to the answer to that question is that the "seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence." The judge answered that question by stating that "the respondent's record is to all intents and purposes a clear record and certainly there are no offences or anything of this nature."

[27] The judge addressed the question of whether there were exceptional circumstances which allowed him to depart from the statutory minimum sentence of 5 years mandated by Article 70 of the Firearms (NI) Order 2004. The judge found that the respondent was not a sympathizer or "fellow traveller" with terrorists and that he had been taken advantage of by a terrorist organization. The judge concluded that "the contents of the medical reports which bear very heavily on the factual circumstances behind the case which are in the basis of plea document constitute exceptional circumstances." On that basis he exercised his statutory power under Article

70 of the 2004 Order to impose a sentence less than the statutory minimum of five years.

[28] In relation to the appropriate level of sentence the judge stated:

> "Had he contested the case I would have imposed a sentence of *five years* but I have to allow for the plea. I have to take into account the powerful mitigating features relating to his mental health which bear heavily on his culpability." (emphasis added)

The judge then imposed sentences of 18 months imprisonment on both counts to run concurrently.

The reference

[29] The prosecution make two core submissions. *First*, it is submitted there is specific sentencing guidance from the authorities provided to the court to the effect that the appropriate sentencing range (after trial) for an offence of this type is in the region 10 - 13 years. *Secondly* it is submitted that the judge's decision finding exceptional circumstances to justify departure from the 5 year minimum was wrong in principle. The prosecution made a number of other submissions including that the judge wrongly gave full credit for the guilty plea, the judge failed to correctly answer questions one and three in *R v Avis & others*, the judge failed to give sufficient weight to the requirement to impose a deterrent sentence, the sentence imposed inadequately reflected the gravity of the offences and the judge must have incorrectly applied the discount for the plea and then applied a further discount for the mitigating factors rather than applying the discount for the mitigating factors and then applying the discount for the plea which is the approach set out by this court in *DPP's Reference No1 of 2016 (David Lee Stewart)* [2017] NICA 1 at paragraph [28].

Sentencing guidelines including the appropriate sentencing range

[30] The maximum sentences for the offences under Articles 58(1) and 45(1) of the 2004 Order are respectively (a) life imprisonment and (b) 10 years or a fine or both. It can be seen that in the hierarchy of offences the more serious offence is that under Article 58(1).

[31] Deterrence has been a consistent and long standing feature of sentencing in this area dating back prior to the legislative intervention brought about by Article 70 of the 2004 Order. In relation to offences such as these deterrent and punitive sentences are required and should be imposed. The reasons for this are obvious. As Lord Bingham LCJ stated in *R v Avis &*

others "the unlawful possession and use of firearms is generally recognized as a grave source of danger to society." There is an obvious gravity involved in gun crime. Guns kill, maim, terrorize and intimidate. They can be and are used to undermine the democratic and peace processes in our community. Criminals, including terrorists need guns to further the commission of other serious crimes, to terrorize communities, to undermine the rule of law and to attack those charged in a democratic society with the enforcement of the law or the protection of persons or property. Sentencing courts must address with deterrent sentences the devastating effect on individual victims and the corrosive impact on both local communities and the wider community in Northern Ireland. Public protection is the paramount consideration. We consider that there is a particular need for deterrence in relation to firearm offences that assist terrorism so that those who facilitate the commission of terrorist crimes must expect deterrent sentences when apprehended.

[32] Deterrence is also a feature of Article 70 of the 2004 Order. Under the rubric "Minimum sentence for certain offences" and in so far as this reference is concerned that Article requires a court to impose "*an appropriate custodial sentence* for a term *of at least" five years* for the offence of possession of a prohibited weapon under Article 45(1) "unless … the court is of the opinion that there are *exceptional circumstances relating to the offence or to the offender* which justify its not doing so" (emphasis added).

[33] The policy underpinning the equivalent provision in England and Wales to Article 70 of the 2004 Order was considered in *R. v Rehman & Wood* [2006] 1 Cr. App. R. (S.) 77. At paragraph [12] Lord Woolf CJ delivering the judgment of the court stated that "… the rationale of Parliament, the policy was to treat the offence as requiring a minimum term unless there were exceptional circumstances, not necessarily because the offender would be a danger in the future, but to send out" a deterrent message. At paragraph [4] it was stated that by deterrence was meant "sentences that pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message that an offender can expect to be dealt with more severely so as to deter others than he would be were it only his personal wrongdoing which the court had to consider." Lord Woolf stated that the policy under the provision equivalent to Article 70 of the 2004 Order was to be contrasted with the policy underlining the mandatory requirement which created an obligation to impose a life sentence under section 2 of the Crime (Sentences) Act 1997 when a person is convicted for a second time of a serious offence. By section 2(2) of that Act the court is then obliged to impose such a sentence unless it is of the opinion that there are exceptional circumstances relating to the offences or to the offender which justify it not doing so. That statutory provision has a different objective being "concerned with the importance of protecting the public against the dangerous activities of the particular offender." We consider that

exceptionality in Article 70 has to be considered by reference to the legislative policy.

[34] In addition to the policy of deterrence contained in Article 70 which requires less attention to be paid to the personal circumstances of the offender this court has repeatedly stated that the personal circumstances of the offender in cases of this gravity are of limited effect in the choice of sentence, see *Attorney General's Reference (No 7 of 2004) (Gary Edward Holmes)* 2004 NICA 42, *Attorney General's Reference (No. 6 of 2004) (Conor Gerard Doyle)* [2004] NICA 33 and *R v Keith McConnan* [2017] NICA 40 at paragraph [49].

[35] The prosecution submitted that the finding of exceptional circumstances was a matter of judicial discretion and conceded that an appellate court will be slow to interfere with the exercise of judicial *discretion*. The qualification in Article 70(2) of the 2004 Order involves the court being of an *opinion*. In that way Article 70 makes it clear that it is the opinion of the court that is critical as to what are the exceptional circumstances. Forming that opinion is more properly characterised as a matter for the *evaluative judgment* of the trial judge based on the circumstances of the offender or the offence (or both) in the context of the facts of the specific case.

[36] The role of this court in relation to that evaluative judgment by the trial judge was considered in *R v Dixon* [2013] EWCA Crim 601 and in *R v Rehman & Wood.* In *R v Dixon* Sir John Thomas (P) stated that "whether (the) exception is applicable" is within "an area of judgment that must be left to the sentencing judge." In *R. v Rehman & Wood* at paragraph [14] Lord Woolf CJ stated that "unless the judge is clearly wrong in identifying exceptional circumstances when they do not exist, or clearly wrong in not identifying exceptional circumstances when they do exist, (the Court of Appeal) will not readily interfere."

[37] The prosecution submitted that the Court of Appeal in England and Wales have "rejected the suggestion" that pressure to hold weapons coupled with mental difficulties could amount to "exceptional circumstances." In support of this submission reliance was placed on the decision in *AG's Reference No.37 of 2013 (R v Culpeper)* [2014] 1 Cr App R (S) 62 C*A*. In that case the offender, who pleaded guilty to being in possession of a prohibited weapon, gave an explanation connected to his drug addiction, a drug debt and depression. The offender said "he was addicted to ecstasy and had accrued a debt he was struggling to pay. The suppliers he said had threatened to harm him and his partner if he did not agree to allow their home to be used to grow cannabis plants and to store the gun and ammunition. He said he had been punched. He agreed out of fear." In that case the judge took into account the offender's long-standing diagnosed depression though no details are given as to the medical evidence in relation to the depression, the degree of depression or as to its consequences in

relation to the response of the offender to the pressure which was exerted on him. The judge considered that the offender's account, his depression and the guilty pleas amounted to exceptional circumstance which permitted departure from the mandatory minimum. The judge imposed a sentence of two years imprisonment. On the Attorney General's reference the Court of Appeal held that the sentence was unduly lenient, quashing it and substituting a term of imprisonment of five years. In arriving at that conclusion the court held that the fact that the offender being *"subjected to pressure and threats is neither unusual nor exceptional. There is nothing severe, unusual or exceptional about his mental health."* However, at paragraph [10] of that judgment it was stated that "individually or taken together the factors *in this case* fall well short of exceptional circumstances." We do not consider that the court in *Culpeper* was stating that pressure and threats to hold weapons coupled with mental difficulties *could never* amount to exceptional circumstances but rather on *the facts of that case* they did not do so.

[38] As we have indicated we do not consider that *Culpeper* is authority for the proposition that pressure and mental difficulties can never amount to exceptional circumstances not only because it was a decision on its own facts but also because such a proposition would be a fetter on the careful scrutiny of the circumstances relating to a *particular* offence or *particular* offender (or both) which is required by Article 70. The proposition advanced by the prosecution would involve a significant restriction on the scope of Article 70 and run counter to the underlying purpose of mitigating the effects of a mandatory minimum custodial sentence of five years and the judicial supervision in individual cases intended by the "exceptional circumstances" provision. Such a proposition would result in an unjustified limitation on the power of the sentencing judge in a particular case to evaluate, on the basis of the evidence before him, whether "the court is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify ..." the court in not imposing a custodial sentence of 5 years.

[39] The phrase "exceptional circumstances" is not defined in the 2004 Order. It is obvious as a matter of the ordinary use of language that the circumstances which might be considered as "exceptional" for the purposes of imposing a shorter sentence than the prescribed minimum must indeed be exceptional. As Sir John Thomas stated at paragraph [20] in *R v Dixon* [2013] EWCA Crim 601 parliament has set the bar as a very high one by choosing the phrase "exceptional circumstances."

[40] A guilty plea has no material impact on exceptional circumstances, see *AG's Reference No.37 of 2013 (R v Culpeper)* at paragraphs [10] and [13].

[41] In addressing the issue of "exceptional circumstances" it is correct for the court to adopt a holistic approach, see *R v Rehman & Wood* [2006] 1 Cr. App. R. (S.) 77 at paragraph [11]. In that case it was stated that "it is not

appropriate to look at each circumstance separately and to conclude that it does not amount to an exceptional circumstance. A holistic approach is needed. There will be cases where there is one single striking feature, which relates either to the offence or the offender, which causes that case to fall within the requirement of exceptional circumstances. There can be other cases where no single factor by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances truly makes the case exceptional."

[42] Evaluation involves critical scrutiny and assessment. In evaluating the evidence as to exceptional circumstances sentencing judges should appreciate that ordinarily *pressure and threats is neither unusual nor exceptional just as ordinarily there is nothing unusual or exceptional about mental health difficulties.* To form an opinion that pressure brought to bear amounts to exceptional circumstances, even in combination with other factors such as mental ill-health, would in large measure blunt the effect of Article 70, contrary to the scheme of deterrent sentencing for which Parliament has made clear provision and which the courts have repeatedly emphasized is necessary. Accordingly a significant degree of caution has to be exercised in evaluating pressure or pressure and mental health difficulties against the background that the bar is deliberately a high bar and in order to meet it the circumstances have to be truly exceptional. We consider that pressure and personal vulnerabilities are usual in cases of this sort. The policy of the legislation as emphasised by Weir J at paragraph [6] of *R v Grant & Madden* [2005] NICC 35 would be undermined if the bar was not high. That paragraph is in the following terms:

> "In the past judges have often said and I now repeat that while dupes like you continue to do the work of parasitic organisations such as the so-called Ulster Defence Association and other like groupings lasting peace cannot be achieved in this community. The leaders of these gangs masquerade as defenders of their communities while lining their own pockets with the proceeds of extortion, racketeering and drug dealing. Yet the people who suffer are rarely those leaders but usually misguided individuals such as you who end up in prison serving lengthy jail terms while those who control you flaunt that ill-gotten wealth and wield their malign power in the communities that they dominate and exploit. Only when people such as you begin to stand up to these godfathers and refuse to do their bidding will your communities escape from their tyranny.

> Otherwise the misery of people such as you and your families will inevitably continue."

[43] The prosecution contends that the sentence was unduly lenient because the court did not identify or apply the appropriate starting point or sentencing range. That raises the question as to what is the appropriate starting point and sentencing range.

[44] In 1998, prior to the statutory imposition of a minimum sentence brought about by Article 70 of the 2004 Order, Lord Bingham LCJ delivering the judgment of the Court of Appeal in *R v Avis & others* stated that:

> "The appropriate level of sentence for a firearms offence, as for any other offence, will depend on all the facts and circumstances relevant to the offence and the offender, and *it would be wrong for this Court to seek to prescribe unduly restrictive sentencing guidelines*" (emphasis added).

Lord Bingham LCJ did not state that there were no guidelines. The aim of sentencing is to obtain consistency whilst allowing for the individual. That aim is not achieved by stating that there are no guidelines. However we are not persuaded that the authorities to which we have been referred establish a sentencing range of 10 – 13 years for the facts and circumstances of this particular case. For the purposes of determining this reference we do not consider it necessary to bring any further definition to the appropriate starting point or sentencing range other than to state that since the decision in *R v Avis & others* the statutory minimum sentence introduced by the legislature in 2004 must have a bearing. We consider that effect must be given to this legislative development so that the bottom end of the sentencing range for the Article 45 offence must be at least five years' imprisonment. The offence under Article 58(1) is in the hierarchy of offences the more serious offence. The sentencing range for that offence must also be informed by the statutory minimum for the offence under Article 45(1).

[45] It is submitted in this case that there are no aggravating features so it is necessary to consider what impact that has on the sentence to be imposed. Obviously the absence of an aggravating feature would mean that the sentence would not be increased. However the impact of the absence of any aggravating features in relation to offences subject to a statutory minimum has been considered by the Court of Appeal in England and Wales in *Attorney General's Reference No.43 of 2009 (Craig Joseph Bennett); R. v Grant Wilkinson [2010] 1 Cr. App. R. (S.) 100.* In that case Lord Judge C.J. delivering the judgment of the Court of Appeal stated that an intended impact of the statutory imposition of minimum sentences included confirmation that possession of a firearm, without more, and *without any aggravating features*

beyond the fact of such possession, is of itself a grave crime, and should be dealt with accordingly.

[46] The question remains as to whether there are any aggravating features in this case. Article 9(1) of the Criminal Justice (Northern Ireland) Order 2008 provides, for instance, that in forming an opinion as to the length of any custodial sentence "a court shall take into account all such information as is available to it about the circumstances of the offence or (as the case may be) of the offence and the offence or offences associated with it (including any aggravating or mitigating factors)." That is a statutory obligation on the court to identify both aggravating and mitigating features *from the information that is available to it*. That statutory obligation is not dependent on the prosecution or the offender identifying the relevant aggravating or mitigating features. Rather the court has to work from the information to identify those features. An aspect of this case is that the prosecution did not identify to the judge any aggravating features from the information that was provided. That was a failure of identification but it did not relieve the judge from the obligation to consider the information so that the court itself identified any aggravating feature which would increase the sentence or any mitigating feature that would reduce the sentence. Whilst, as will become apparent, we consider that there were aggravating features and as an exception in this case as they were not identified at any stage to us or to the judge we have arrived at our conclusions without reference to them. We identify them to ensure that in any future sentencing exercise they are identified and are taken into account.

[47] In view of the fact that concurrent sentences were imposed then a potential aggravating feature in relation to the Article 58(1) offence is that one of the weapons was a prohibited weapon. The justification for treating that as an aggravating feature in respect of the Article 58(1) offence is that otherwise the offender would escape punishment entirely by subsuming the sentence for the Article 45(1) offence into the penalty imposed for the Article 58(1) offence, see *R v Samuel Robinson* and in *Attorney-General's Reference (No. 1 of 1991)* [1991] NI 218. However, we do not consider it to be appropriate on the facts of this case to take into account as an aggravating feature in respect of the Article 58(1) offence that one of the weapons was a prohibited weapon. We arrive at that view because as we have indicated the Article 45(1) offence has already been taken into account in determining that the starting point for the Article 58(1) offence must be a minimum of five years.

[48] However on the facts of this case we do consider that there are aggravating features namely (a) the fact that the weapons and ammunition were to be available for terrorist activity and (b) the quantity of weapons and ammunition.

[49] We note that one of the factors raised in mitigation were the bail conditions which had been imposed on the respondent. The judge did not

take that into account in finding exceptional circumstances or in mitigation. We consider that he was correct not to do so. Section 240A of the Criminal Justice Act 2003 which in certain specified circumstances requires credit to be given in computing a sentence for time spent on bail subject to certain conditions does not apply in this jurisdiction. The position at common law as to whether certain bail conditions are a mitigating factor has been considered in a consistent line of authorities in England and Wales for which see amongst others *R v Glover* [2008] EWCA Crim 1782, *R v Abdul Sherif* [2008] EWCA Crim 2653 and *R v Barrett* [2009] EWCA Crim 2213. This court has considered and applied the approach in England and Wales in an unreported ex tempore judgment of Girvan LJ delivered on 26 September 2014 (there is a reporting restriction in relation to the name of the offender in relation to that case).

Discussion

[50] The starting point in this case ought to have been at least five years custody.

[51] We have considered what starting point was adopted by the judge. As we have indicated at paragraph [28] the judge stated that had the respondent contested the case the sentence which would have imposed was *five years* (that is 60 months) but that there had to be allowance for the plea. We consider that this could only mean that the 60 month sentence took into account all the mitigating features except for the plea. From this it can be seen that even if there were exceptional circumstances and applying to 60 months the maximum discount for the plea of one third the sentence which ought to have been imposed was one of 40 months, not 18 months. This means that the sentence of 18 months is unduly lenient even if there was no question about the level of discount for the plea and even if there were exceptional circumstances in this case.

[52] We have also considered whether the judge either chose another starting point or arrived at the sentence on some other basis. As we have indicated at paragraph [28] the judge went on to say that he had to "take into account the powerful mitigating features relating to (the respondent's) mental health which bear heavily on his culpability." It could be suggested that the judge used the five year starting point then reduced from 60 months to 40 months for the plea and then reduced again by some 22 months for the mitigating factors to arrive at 18 months. It is common case that if this was so then the judge did not follow the approach set out by this court in *DPP's Reference No1 of 2016 (David Lee Stewart)* in that he must have incorrectly applied the discount for the plea and then applied a further discount for the mitigating factors rather than applying the discount for the mitigating factors and then applying the discount for the plea. We would add that the discount of 22 months for the mitigating factors would have been excessive. We do not consider that the judge arrived at the sentence on this basis but rather the

reference to five years (60 months) took into account all the mitigating features except for the plea.

[53] Even if there were exceptional circumstances we also consider that the sentence was unduly lenient on the basis of a number of other points.

[54] The trial judge addressed and answered each of the questions posed in *R v Avis & others*. We consider that there is substance in relation to the criticism of the replies to first and third questions which led to an understatement of the seriousness of these offences.

[55] The *first question* is "*what sort of weapon is involved*?" We consider that the answer provided laid inappropriate emphasis on rust and corrosion rather than functionality. Any rust or corrosion should not distract from this being a lethal deadly weapon. We consider that whether it is rusted or corroded is neither here nor there if it is functional and can kill or cause serious injury. We consider that the answer should have been:

> "There were three weapons. The most significant of which was a functional sub machine gun which was a highly dangerous weapon. It was unloaded but there was available for use in connection with this weapon a small amount of ammunition. In addition there were two hand guns capable of firing blank cartridges including those containing ball bearings. Furthermore all three weapons could be used to frighten and intimidate victims in order to reinforce unlawful demands."

[56] The *third question* is "*with what intention (if any) did the respondent possess or use the firearm?*" The answer provided drew the valid distinction between first limb intention (that is intention by the offender by means of the weapons to endanger life) and second limb intention (that is intention to enable some other person by means therefore to endanger life). However, this distinction should not obscure that these weapons and ammunition were possessed by the respondent with the intent to enable members of a dissident terrorist organization to endanger life. We consider that by answering the question in the way that he did the judge failed to place sufficient emphasis on the specific criminal intent obscuring that this was a most serious offence.

[57] We consider that the judge was somewhat generous in relation to the discount for the plea. The respondent did not plead guilty at arraignment either to these offences or to any lesser offence. We also have concerns as to why disclosure or the discovery of a fingerprint had any impact on the stage at which the respondent pleaded guilty. However, if this was the only criticism we would not consider that the overall sentence was unduly lenient.

[58] The judge found that there were exceptional circumstances. We have given anxious consideration as to whether he was clearly wrong to do so. We bear in mind the observations of Rafferty LJ in *Culpeper* and to our mind there is nothing exceptional about the offence. Rather it is the combination of the offence and the offender which has to be considered. The respondent was placed under both verbal and physical pressure to hold the items which pressure has to be evaluated in the context of his psychological condition and his below average intelligence. If the prosecution wished to challenge any of the facts around either the offence or the offender then they should have done so at trial. For instance a challenge could have been, but was not mounted, to the medical evidence through the prosecution engaging another expert. Instead the prosecution accepted as the basis of plea the matters set out in paragraph [11]. We are not minded *holistically on the facts of this case* to find that the judge was clearly wrong to find that *the combination of those factors* amounted to exceptional circumstances. It is not necessary to analyse all the other factors set out in paragraph [14] to determine whether they could be relevant to the question as to whether there were exceptional circumstances except to state that those identified in paragraph [14] (i), (iv) & (vii) do not.

[59] We proceed on the basis that the judge was justified in finding exceptional circumstances having regard to the combination both the offence and the offender so that the sentence imposed could be less than five years. We consider that prior to the plea the appropriate sentence was one of at least five years custody. We consider that the discount for the plea was somewhat generous and that the appropriate sentence ought to have been one of 3 years and 6 months custody.

Discretion as to whether to quash the sentence

[60] We consider that the sentence was unduly lenient but that does not mean that it must be quashed. Rather even if it is decided that a sentence is unduly lenient there is discretion as to whether to quash the sentence – see *Attorney General's Reference (No: 1/2006) Gary McDonald and others* [2006] NICA 4 at paragraph 37.

[61] The respondent has now served the custodial element of his 18 month sentence and accordingly if the sentence was quashed and this court imposed an increase in sentence that would involve him returning to prison. Ordinarily that is a factor to be taken into account by way of a reduction to the sentence to be passed under the principle of double jeopardy, see *R v Loughlin (Michael) (DPP Reference No 5 2018)* [2019] NICA 10 at [35]. However on the unusual facts of this case we take it into account as a factor of some minor weight at this anterior stage in exercise of discretion as to whether to quash the sentence.

[62] A feature of particular importance and a factor which has considerable weight in this case is that by this reference the prosecution is seeking to advance for the very first time an entirely new case. That is unfair to the respondent because it exposes him to the risk of a significantly greater sentence on an entirely new basis not advanced before the judge. It is also unfair to the judge who gave detailed consideration to the sentencing exercise as it was advanced before him. The prosecution have the obligation to place before the trial judge any arguments or material that is relevant to the issue upon which the judge is called upon to make a decision. We consider that on the facts of this case this amounted to conspicuous unfairness to the respondent.

[63] We have taken into account the countervailing interest in an appropriate sentence being passed on the respondent. We note that by this judgment we have identified various matters that should assist in any future sentencing exercises. On the facts of this case and taking all those factors into account we consider that the feature which we have identified in the previous paragraph taken in combination with the fact that if the sentence was quashed and an increased sentence was passed then this would mean that the respondent would return to prison means that in the exercise of discretion that the sentence should not quashed.

Conclusion

[64] The sentence that was imposed was unduly lenient.

[65] For the reasons we have given we do not quash the sentence.